Tok Siew Ling & Anor v Low Chee Choy

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCVC-1078–09 OF 2012
YEOH WEE SIAM J
1 NOVEMBER 2013

Evidence — Documentary evidence — Agreed bundle — Document classified as Part B document — Meaning — Whether authenticity not disputed — Whether maker not required to testify on authenticity — Whether contents of document may be accepted as unrebutted if unchallenged

Succession — Probate — Testamentary capacity — Whether deceased had testamentary capacity to execute will — Whether defendant discharged burden of proving testamentary capacity — Whether plaintiff's allegation that deceased's thumbprint affixed by defendant when deceased was heavily sedated and not fully conscious true — Rules of the High Court 1980 O 72 r 2(1)

Succession — Will — Validity — Deceased's cohabiting partner applied for and obtained grant of probate — Deceased's siblings (plaintiffs) challenged validity of will — Whether deceased had testamentary capacity to execute will — Whether there were suspicious circumstances surrounding making of will — Whether defendant discharged burden of proving testamentary capacity and due execution of will — Whether plaintiff's allegation that deceased's thumbprint affixed by defendant when deceased was heavily sedated and not fully conscious true — Rules of the High Court 1980 O 72 r 2(1)

The plaintiffs were the siblings of the late Toh Tew Ngoh ('the deceased'). The deceased and the defendant had not married but had lived as a couple since 1962. They had no children. The defendant was the executor of the estate of the deceased by grant of probate issued on 10 January 2012 ('the grant') based on a will purported to have been made by the deceased in 2011 ('2011 will'). The plaintiffs commenced this probate action under O 72 r 2(1) of the Rules of the High Court 1980 for the revocation of the grant. The plaintiffs, inter alia, prayed for declarations that the grant was invalid and that the said grant be revoked. The plaintiffs claimed that an earlier will made by the deceased in 1984 ('1984 will') was the deceased's actual will. The deceased was not literate in English but she could speak Cantonese and, according to her siblings, the deceased used to sign her documents and not thumbprint them. The witnesses for the defence claimed that on 20 June 2011 the deceased was conscious and had testamentary capacity to execute the 2011 will. However, they claimed that

the deceased affixed her thumbprint on the 2011 will, assisted by the defendant, because she was weak.

Held, allowing the plaintiff's claim:

(1) The defendant, being the propounder of the 2011 will, bore the burden of proving that: (a) the deceased had testamentary capacity at the time when she executed the will; (b) the will was duly executed; and (c) there were no suspicious circumstances surrounding the making of the will. Once the defendant had discharged this burden of proof, the burden then shifted to the plaintiffs to prove the extraneous vitiating element such as fraud (see paras 25–26).

(2) It was highly improbable that the deceased did in fact execute the 2011 will. There was a high probability that what the plaintiffs alleged was true ie that the deceased's thumbprint was affixed by the defendant when the deceased was heavily sedated and not fully conscious after 20 June 2011, in the days before she passed away. Further if the deceased was too weak to sign and therefore had to thumbprint the 2011 will, then the serious doubt arose as to who actually dated the 2011 will. It could not have been the deceased because, according to the defendant, the deceased was purportedly too weak to sign it (see paras 54–55).

(3) The 1984 will had been agreed by both parties during the case management stage, that this document be classified as a Part B document. This meant that the authenticity, or the making of the 1984 will, was not disputed from the outset. Therefore, the maker of the 1984 will and the two witnesses to the execution of the 1984 will were not required to come to court to testify on the authenticity of the 1984 will. In the absence of any challenge by the defendant on the contents of the 1984 will, the court accepted the contents of the 1984 will as being unrebutted (see paras 65–66).

[Bahasa Malaysia summary

Plaintif-plaintif adalah adik beradik kepada mendiang Toh Tew Ngah (si mati). Si mati dan defendan tidak pernah berkahwin tetapi telah hidup bersama sebagai pasangan sejak 1962. Mereka tidak mempunyai zuriat. Defendan adalah wasi kepada estet si mati melalui geran probet yang dikeluarkan pada 10 Januari 2012 (geran) berdasarkan wasiat yang dikatakan dibuat oleh si mati pada tahun 2011 (wasiat 2011). Plaintif-plaintif memulakan tindakan probet di bawah A 72 k 2(1) Kaedah-kaedah Mahkamah Tinggi 1980 untuk membatalkan geran tersebut. Plaintif-plaintif antara lain memohon deklarasi bahawa geran tersebut adalah tidak sah dan dibatalkan. Plaintif-plaintif mendakwa bahawa wasiat terdahulu yang dibuat oleh si mati pada tahun 1984 (wasiat 1984) adalah wasiat sebenar si mati. Si mati tidak memahami Bahasa Inggeris tetapi dia boleh bertutur dalam Bahasa Kantonis dan, menurut

A plaintif-plaintif, adik-beradik si mati, si mati selalunya menandatangani segala dokumen-dokumen dan menggunakan cap jari untuk pengesahan dokumen-dokumen.

B **Diputuskan,** membenarkan permohonan plaintif:

(1) Defendan, merupakan orang yang mengemukakan dalam wasiat 2011, menanggung beban untuk membuktikan bahawa (a) si mati mempunyai kapasiti untuk memberi wasiat sewaktu dia membuat wasiat; (b) wasiat tersebut telah dimeterai; (c) tiada situasi keadaan yang mencurigakan C sewaktu membuat wasiat. Sebaik sahaja defendan melepaskan beban pembuktian tersebut, beban tersebut berpindah kepada plaintif untuk membutikan terdapat elemen luaran yang menjejaskan wasiat tersebut seperti fraud (lihat perenggan 25–26).

D (2) Kemungkinan bahawa si mati telah membuat wasiat 2011 adalah sangat tinggi. Terdapat kemungkinan besar juga bahawa apa yang didakwa oleh plaintif-plaintif adalah benar, iaitu bahawa cap jari si mati telah diturunkan oleh defendan semasa si mati sedang berada di bawah pengaruh ubat yang kuat dan dalam keadaan separa sedar selepas 20 jun E 2011, hari-hari sebelum kematiannya. Tambahan lagi, jika si mati terlalu lemah untuk menandatangani dan oleh itu terpaksa menurunkan pengesahan cap jari bagi wasiat 2011, oleh itu timbul keraguan yang sangat tinggi akan siapa sebenarnya yang telah mengesahkan tarikh bagi wasiat 2011. Si mati tidak mungkin berupaya mengesahkan tarikh wasiat F tersebut kerana, menurut defendan, si mati dikatakan amat lemah untuk menandatanganinya (lihat perenggan 54–55).

(3) Wasiat 1984 telah dipersetujui oleh kedua-dua pihak sewaktu di peringkat pengurusan kes, bahawa dokumen tersebut akan G diklasifikasikan sebagai dokumen Bahagian B. Itu bermaksud, bahawa ketulenan, atau pembuatan wasiat 1984, tidak dipertikaikan dari permulaan. Oleh itu, pembuat wasiat 1984 tidak perlu hadir ke mahkamah untuk memberi keterangan akan ketulenan wasiat 1984. oleh kerana defendan tidak mencabar kandungan wasiat 1984, mahkamah H menerima kandungan wasiat tersebut tidak dipertikaikan (lihat perenggan 65–66).]

Notes

For cases on agreed bundle, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) I paras 1372–1385.

For cases on testamentary capacity, see 11 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2603–2616.

For cases on validity, see 11 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2840–2847.

Cases referred to

Barry v Butlin (1838) II Moo PCC 480 (refd)
Gan Yook Chin & Anor v Lee Ing Chin Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 304, FC (refd)
Hue Chooi Yin (P) v Chew Pit King [2011] 2 AMR 56, HC (refd)
Pang Kwee Yin v Teh Sew Wan [2012] 5 MLJ 225; [2012] 2 AMR 539, HC (refd)
Thiang Kai Goh v Yee Bee Eng & Ors [2005] 1 MLJ 431, HC (refd)
Tho Yow Pew & Anor v Chua Kooi Hean [2002] 4 MLJ 97; [2002] 4 CLJ 90, CA (refd)

Legislation referred to

Civil Marriage Ordinance 1952
Evidence Act 1950 s 74, 74(a)(iii), (b)
Law Reform (Marriage and Divorce) Act 1976
Rules of the High Court 1980 O 72 rr 2(1), 7
Rules of Court 2012 O 72 r 8

Chandran Nair (Thevin, Chandran & Assocs) for the plaintiff.
Daniel Siew (Lee Kuan Mang & Co) for the defendant.

Yeoh Wee Siam J:

PROBATE ACTION

[1] Effectively, this is a probate action commenced by writ under O 72 r 2(1) of the Rules of the High Court 1980 ('the RHC') for the revocation of the grant of probate of the will (note: the RHC have been revoked and replaced on 1 August 2012 by the Rules of Court 2012 ('the ROC')).

[2] The prerequisite for the commencement of a probate action is that a citation is issued under O 72 r 7 of the RHC. By an order dated 6 August 2012 the Kuala Lumpur High Court issued the citation directing the defendant to deposit the probate with the registry under O 72 r 8 of the ROC. This has been duly complied with by the defendant.

AMENDED WRIT OF SUMMONS AND AMENDED STATEMENT OF CLAIM ('SOC')

[3] In para 17 of the SOC, the plaintiffs applied for the following reliefs:

(a) a declaration that the grant of probate dated 10 January 2012 issued in Kuala Lumpur High Court Petition No S-32NCVC-942–09 of 2011 is invalid;

(b) an order that the said grant of probate be revoked;

(c) an order that the plaintiffs proceed to probate the will dated 11 January 1984 and be appointed as executors and administrators of the estate of the said deceased in accordance with the desire of the decease expressed therein;

(d) a further order that the said estate be distributed in accordance with the terms of the will dated 11 January 1984;

(e) the defendant to pay all the solicitor/client costs incurred by the plaintiffs in this suit;

(f) costs;

(g) interest on the costs at 5%pa from the date of judgment to date of satisfaction;

(h) such further or other relief.

PARTIES

[4] The plaintiffs are two out of six siblings of the late Toh Tew Ngoh ('the deceased'). The first plaintiff ('P1') is the deceased's younger sister. The second plaintiff ('P2') is the deceased's step-brother.

[5] The defendant is the executor of the estate of the deceased by grant of probate issued on 10 January 2012 by the Kuala Lumpur High Court Petition No 32NCVC-942–09 of 2011.

BACKGROUND FACTS

[6] The deceased was the eldest amongst her six siblings. The deceased and her parents and siblings lived together in a squatter settlement at Jalan Ipoh, Kuala Lumpur in the 1960s ('family house'). The deceased and the defendant began their relationship in 1962.

[7] The deceased's father died in an accident in 1965. Thereafter, the deceased, being the eldest child, had to support her family. A

[8] There was no legal registration of their marriage, but the defendant and deceased used to sleep together frequently in the same room in the deceased's family house. B

[9] In the early 1970s, the defendant and the deceased purportedly moved to live together at their house in Taman Kok Lian ('Taman Kok Lian house'). Not long after that, the deceased's family moved from their family house to a house in Taman Kepong ('Taman Kepong house'). Toh Siew Leong ('PW3'), one of the deceased's sisters, today resides at this house which belongs to the estate of the deceased. C

[10] The deceased and the defendant had no children. According to the defendant, it is because the deceased had a medical condition ie asthma. D

[11] In 1975 the defendant 'married' a second wife, Tan Guat Hoh ('DW4'), purportedly with the blessings of the deceased. This second marriage was also not registered according to law. From this second marriage, the defendant had two children ie a son, Vincent Low Wei Sheng ('DW5'), now 32 years old, and a daughter. E

[12] In 2011, the deceased was diagnosed with cancer and was treated at the Selayang Hospital. She passed away at the same Hospital on 11 July 2011. F

[13] The plaintiffs contended that in 1984 the deceased had executed a will ('the 1984 will') (CBOD1 Part B pp 1–4) where all the deceased's siblings were made beneficiaries of the deceased's estate. G

[14] The defendant contended that on 20 June 2011, the deceased executed her latest will and last testament ('the 2011 will') (CBOD1 Part B pp 6–7). In the 2011 will, the deceased gave all her properties to the defendant as the sole beneficiary. H

THE PROPERTIES

[15] The deceased had purchased the following properties in her name: I

(a) the Taman Kok Lian house, which is a single storey house;

(b) a double storey link house in Taman Muda, Ampang, Selangor;

(c) the Taman Kepong house, which is a double storey link house;

A (d) two pieces of leasehold lands in Mukim Batu, Kuala Lumpur, of which she is the registered owner of 1/2 share of each piece of land. The defendant is the registered owner of the other 1/2 share of each piece of land.

(see full particulars of the properties in paras 6 and 7 of the SOC).

B

ISSUES TO BE TRIED

[16] The main issue is whether the 1984 will dated 14 January 1984 is valid and effective, or whether the 2011 will dated 20 June 2011, purportedly being the last will and last testament of the deceased, is valid and effective and has revoked the 1984 will.

C

BURDEN OF PROOF

D

[17] The first principle has been well stated in an old English case, *Barry v Butlin* (1838) II Moo PCC 480:

> The onus of proving a will being on the party propounding it, is in general discharged by proof of capacity, and the fact of execution; from which the knowledge of and assent to its contents by the testator will be assumed.

E

[18] In *Gan Yook Chin & Anor v Lee Ing Chin Lee Teck Seng & Ors* [2005] 2 MLJ 1 at p 12; [2004] 4 CLJ 304 at p 322, the Federal Court held:

F

> … where the validity of a will was challenged, the burden of proving testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will; that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will.

G

[19] In *Thiang Kai Goh v Yee Bee Eng & Ors* [2005] 1 MLJ 431, Suriyadi J (as he then was) stated at pp 436–437:

H

> [11] Despite the burden of proof being on the shoulders of the defendants to establish the validity of the will, at the end of the trial the plaintiff cannot escape the requirements of ss 101 and 102 of the Evidence Act. They read:
>
> 101 Burden of proof
>
> I (a) Whoever so desires any court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that those facts exist.
>
> (b) When a person is bound to prove the existence of any fact, it is said that the burden lies on that person.

102 On whom the burden of proof lies

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

[12] Regardless of the fact that the burden has shifted to the defendants the moment the will was challenged it is still incumbent on the plaintiff at the end of the whole case to prove his case on a balance of probability. At the end of it all, the plaintiff to succeed must prove that the testator had no testamentary capacity when he affixed his thumbprint to the said will.

EVALUATION AND FINDINGS

The relationship between the defendant and the deceased

[20] There is ample evidence that since the early 1960s until the deceased passed away on 11 July 2011, over a time span of about 46 years, the defendant and the deceased had a very close and intimate relationship, as can be seen from the abundance of evidence adduced by the defendant:

(a) they slept together frequently in the deceased's family house, occupying one of the three rooms, whilst the deceased's mother and siblings occupied the other two rooms;

(b) their house at Taman Kok Lian appears to be like a matrimonial home, with their photographs, and master bedroom with their clothes kept in the same cupboard (CBOD1 Part B p 1);

(c) the 'funeral service purchase' form where the deceased stated her 'marital status' as 'M' ie the abbreviation for 'married'. At the column for 'nominee' she named the defendant as her 'husband' (CBOD 1 Part B pp 101–102);

(d) the defendant had declared in the form, 'funeral service purchase' that the deceased is his wife;

(e) the 'Purchase Form for Burial Plot' where the deceased had stated her 'marital status' as 'M' ie the abbreviation for 'married', and her house as being at Taman Kok Lian (CBOD1 Part B p 107);

(f) the form for 'Hole excavation' where the deceased had ordered a double burial chamber for the tomb, purportedly for her and the deceased to be buried side by side as husband and wife according to Chinese custom (CBOD1 Part B p 109);

(g) the society's recognition of the defendant and the deceased as husband and wife:

(i) the Chinese New Year greeting card from the defendant's employer, Datuk Amar Steven Yong, addressed to both the defendant and deceased at the envelope as 'Mr & Mrs Low Chee Choy' (CBOD1 Part B pp 62–63);

(ii) the letter from the defendant's and deceased's conveyancing solicitors, Messrs Chew Biman & Co, addressed them as 'Mr & Mrs Low Chee Choy';

(iii) the condolence notices advertised in the various Chinese newspapers recognised the defendant and the deceased as husband and wife (CBOD1 Part B pp 123–126, 129 and 130);

(iv) P2 himself had honoured the defendant during the tea ceremony as his elder brother-in-law during his marriage (CBOD1 Part B pp 57 and 58);

(v) the defendant was honoured as the elder uncle-in-law during the Chinese customary tea ceremony by the deceased's nephew and nieces during their marriage (CBOD1 Part B pp 53–55). In fact, in CB0D1 Part B pp 59 and 60, the photographs show P1's own son serving tea to the defendant and deceased during the son's wedding (see the full evidence of the defendant regarding his alleged marital relationship with the deceased in his witness statement, DW6-WS, from pp 15–34).

[21] The defendant admitted that his marriage with the deceased was not registered under the Law Reform (Marriage and Divorce) Act 1976 ('the LRA').

[22] It is clear from the evidence that from 1962 until the deceased's death, the defendant and the deceased did not go through any Chinese customary marriage by way of a tea ceremony, or had their relationship registered as a marriage under the Civil Marriage Ordinance 1952 ('the CMO') or the LRA. Therefore, the court finds that there is no valid, legal, and registered marriage between the defendant and the deceased (see also my two previous decisions given in the Family Court, High Court Kuala Lumpur in *Hue Chooi Yin (P) v Chew Pit King* [2011] 2 AMR 56 and *Pang Kwee Yin v Teh Sew Wan* [2012] 5 MLJ 225; [2012] 2 AMR 539). Similarly, there is no valid, legal, and registered marriage between the defendant and his second wife, DW4. However, at all times the defendant held himself out as the husband of the deceased, and also the husband of DW4.

[23] Since there is no legal marriage between the defendant and the deceased,

the defendant has no legal claim as a husband on the estate of the deceased unless the 2011 will is found to be valid and effective in his favour.

[24] It must also be borne in mind that there is no question of the defendant's contributions to the acquisition of the deceased's properties being considered here since such properties are not matrimonial assets.

The 2011 will

[25] The defendant, being the propounder of the 2011 will, bears the burden of proving that:

(a) the deceased had testamentary capacity at the time when she executed the will;

(b) the will was duly executed;

(c) there were no suspicious circumstances surrounding the making of the will.

[26] Once the defendant has discharged the above burden of proof, the burden shall then shift to the plaintiffs to prove the extraneous vitiating element such as fraud as in the present case.

Regarding (a), (b) and (c) above

[27] The defendant (DW6) stated that at the time when the deceased executed the will on 20 June 2011, between 1pm to 2pm, from her hospital bed at the Selayang Hospital in the ward, she was conscious and mentally alert. She understood the nature of her act and the effects of the will. The deceased was too weak to sign the will. Thus, the defendant, who had brought a stamp pad to the Hospital, assisted the deceased to affix her thumbprint on the will in the presence of two witnesses ie Lim Keong Hwa @ Saw Hock Seng ('DW2') and Teo Kah Chwi @ Chang Koh Chee ('DW3'). The court questions how would the defendant know that the deceased on that day would be too weak to sign in execution of the will, and thus the defendant came to the Hospital, ready with a stamp pad for her thumbprint. This appears to be rather suspicious conduct on the part of the defendant. The evidence shows that on that day the defendant accompanied the deceased for outpatient care at the Dermatology Clinic of the Hospital. It is rather strange that prior to that, on the day before, ie on 19 June 2011, the defendant had arranged with the two intended witnesses to the will, DW2 and DW3, to meet him at the Hospital to witness the deceased's execution of the will. It appears to be all pre-planned by the defendant.

[28] Lee Fong Ling ('DW1'), the solicitor from Messrs Lee, Kitty & Partners, gave evidence that she was the one who prepared the 2011 will and last testament of the deceased ('the 2011 will / the will'). She stated that the deceased and 'her husband', the defendant, were her father's friends. Sometime in May 2011, the defendant and the deceased made an arrangement for a meeting with DW1 at DW1's father's house to discuss matters relating to the making of a will. DW1 met them at her father's house. This was because the deceased was sick and had requested to meet DW1 at DW1's father's house, which is nearer to the deceased's residence.

[29] DW1 stated that the contents of the 2011 will were prepared by her according to the deceased's instructions on the assets. DW1 advised both the deceased and the defendant that the deceased would need two witnesses on the execution of the said will. DW1 also mentioned to the deceased that she could either sign or thumbprint the will. The deceased told DW1 that she would only execute the finalised will and last testament at the proper time when she is ready ie at any time in the future. The deceased would then get the witnesses to witness it.

[30] DW1 went on to state that about one week after the meeting, she had drafted and finalised the will. The defendant came to her office to collect it.

[31] DW1 further stated that when the defendant collected the will from her office she asked him to tell the deceased to call her. DW1 wanted to confirm with the deceased the contents of the will ie DW1 wanted to let the deceased know that these are the properties and the property particulars that the deceased wanted to give and to whom. The telephone call was intended for DW1 to translate the document to the deceased, which DW1 did, from English to the deceased in Cantonese.

[32] DW1 confirmed that she did not attest the will. She further agreed with counsel for the plaintiff, during cross-examination, that the attestation clause at p 4 of the will is not correct because it is stated therein that the testator 'signed' the will, although the will was thumbprinted, and not signed, by the deceased.

[33] Upon being questioned by the court, DW1 stated that there is no endorsement or record anywhere that she had translated the contents of the will to the deceased. DW1 had only prepared one copy of the original will and she gave that to the defendant for the deceased. She only has a photocopy which she did not produce in court.

[34] The two witnesses to the will, DW2 and DW3, corroborated the defendant's evidence, and each other's evidence that the deceased was conscious

and aware when the deceased affixed her thumbprint on the will in their presence, assisted by the defendant. They stated that the deceased did not sign because she looked weak. DW3 stated that the deceased's hand was shaking.

[35] On the other hand, the Cambodian maid, Seng Mom ('PW5'), employed by the deceased's sister, Toh Siew Leong ('PW3'), stated that on 20 June 2011 she was asked to accompany the deceased and the defendant to the hospital. She was with the deceased all the time that day until after 7pm to take care of the deceased. When she was with the deceased, she did not see anyone coming to the deceased's ward with the defendant. The defendant was with the deceased for 1/4 hour and then left the hospital. PW5 was never cross-examined whether she was in the emergency ward with the deceased. In the absence of any rebuttal evidence, it can be safely concluded that PW5, throughout that visit to the hospital on 20 June 2011, was with the deceased until after 7pm PW5 did not see the defendant, DW2 and DW3 with the deceased for the purported execution of the will.

[36] During the cross-examination of the defendant (DW6), counsel for the plaintiffs produced two documents ie a statement of confirmation on the deceased's treatment (exh D1A) and statement of admission to the patient's Ward (exh D1B) at the Selayang Hospital ('the hospital').

[37] In exh D1A, Noor Azlin bt Mohd Sharif, the Head of Department of the Medical Records Department of the hospital, stated that based on the deceased's patient records at the hospital, the deceased received treatment on 20 June 2011 at 11am and was admitted to the ward for general surgery, through the Emergency Department, on the same day until 22 June 2011.

[38] In exh D1B, Norkhayati bt Mamat, the assistant administrative officer from the hospital's Medical Records Department, confirmed that the deceased was admitted to hospital on 20 June 2011 as follows:

Bil	Masa Rawatan	Jabatan
1.	11.15 AM	KLINIK DERMATOLOGI
2.	11.57 AM	KECEMASAN
3.	7.10 PM	WAD 4A (PEMBEDAHAN AM).

[39] After considering the evidence in totality, the court finds that exhs D1A and D1B, if accepted by the court, would demolish the defendant's case completely. The question is whether exhs D1A and D1B can be admitted and accepted by the court.

[40] Counsel for the plaintiffs informed the court that there was no way he

A could introduce exhs D1A and D1B during the case for the plaintiffs. This is because at that stage, there was no way the plaintiffs could know the exact time on 20 June 2011 when the will was purportedly executed by the deceased. It was only after the plaintiffs' case had closed, including the completion of the evidence of Dr Lee Yuk Loong ('Dr Lee') (PW4) from the General Surgical B Department, Selayang Hospital, and in the course of the evidence of the two purported witnesses to the 2011 will, ie DW2 and DW3, and of the evidence of the defendant himself ('DW6'), that it was revealed by the defendant's witnesses that the 2011 will was executed by the deceased on 20 June 2011 between 1pm to 2pm in her ward 4A at the hospital.

C

[41] The subsequent notice of application filed by the plaintiffs (encl 53) to recall Dr Lee to tender further hospital records which Dr Lee discovered after giving his evidence in court was dismissed by the court after the hearing in chambers on 22 August 2013. However, the court did inform counsel for the D plaintiffs that he could put the plaintiffs' case through the cross-examination of the defendant's witnesses.

[42] During the trial, counsel for the plaintiffs then produced exhs D1A and D1B, during the cross-examination of the defendant, under s 74 of the E Evidence Act 1950 which provides:

Public documents

74 The following documents are public documents:

F (a) documents forming the acts or records of the acts of -

(i) the sovereign authority;

(ii) official bodies and tribunals; and

(iii) public officers, legislative, judicial and executive, whether Federal or G State or of any other part of the Commonwealth or of a foreign country; and

(b) public records kept in Malaysia of private documents.

H **[43]** It is clear from the above s 74(a)(iii) and/or (b) that exhs D1A and D1B are public documents.

[44] In *Evidence, Practice and Procedure* (2nd Ed) by Augustine Paul at p 602, regarding s 74 it is stated:

I

Manner of proving public documents.

A public document may be proved in evidence by tendering the original or by way of a certified copy thereof. In *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1994] 1 MLJ 592 (HC) it was held that where the

document is a public document the best evidence rule is inapplicable and that secondary evidence may be adduced not only as to the existence of such document but also as to its contents.

[45] Therefore, guided by the above, I am of the view that exhs D1A and D1B, which are original documents of the hospital, can be admitted and accepted by this court not only as to the existence of such documents but also as to its contents. There is no necessity for the makers of the two documents to come to court. The contents are self-explanatory.

[46] From exhs D1A and D1B, the court finds that, as what the defendant had testified, it is true that the deceased went for outpatient care at 11am and was at the skin clinic at 11.15am at the hospital. However, contrary to what the defendant and DW2 and DW3 had testified when they corroborated each other's evidence that the deceased affixed her thumbprint on the 2011 will at ward 4A between 1pm to 2pm, that is not true because from 11.57am onwards until about 7pm, the deceased was at the Emergency Department. The deceased was finally sent to ward 4A of the Hospital at 7.10pm on the same day, on 20 June 2011. She was discharged two days later on 22 June 2011.

[47] Since the deceased was not at ward 4A on 20 June 2011 between 1pm to 2pm, it can be safely concluded that the deceased did not execute the 2011 will at all at the time and in the manner stated by DW2, DW3 and the defendant. That being the case, the logical conclusion is that the 2011 will had been forged or fraudulently obtained by the defendant, and DW2 and DW3 did not witness the execution of the will by the deceased on 20 June 2011.

[48] Even if I were to err in admitting exhs D1A and D1B, based on the other evidence adduced, the court is also satisfied that the 2011 will cannot be accepted as valid for the following reasons:

It is highly improbable that the deceased did in fact execute the will. The deceased was not literate in English but she could speak Cantonese and, according to her siblings ie P1, P2 and PW3, the deceased used to sign her documents and not thumbprint them.

[49] DW1, DW2 and DW3 stated that on 20 June 2011 the deceased was conscious and had testamentary capacity to execute the 2011 will. However, she affixed her thumbprint, assisted by the defendant, because she was weak.

[50] DW2 testified that when he went to the hospital, the deceased was in a four bedded room. DW2 knew that the deceased worked as a cashier and definitely she knew how to sign her name. DW2 stated that the deceased was sick but he chatted with her. DW2 confirmed that the 2011 will was in English

but it was not translated to the deceased when she purportedly affixed her thumbprint on it, without any struggle. DW2 informed the court that he and the deceased had a conversation before the execution of the will. The deceased mentioned that she troubled DW2 and DW3 to come to be the witnesses, to sign the will. DW2 further informed the court that the deceased was sitting up and leaning against the bed. She was weak and sick 'even though she looked ok'. Before DW2 left, the deceased thanked DW2 to be the witness for her signing of the will.

[51] DW3 also confirmed that the 2011 will was not read to and explained to the deceased in his presence. He stated that he and DW2 met the defendant on 20 June 2011 at the lobby of the hospital, as agreed by them on 19 June 2011. The defendant took DW2 and DW3 to the deceased's ward. When the deceased first saw DW2 she had a chat with DW2 because they knew each other very well. DW3 also greeted the deceased and spoke with her a few words in Hainanese. When asked in cross-examination about the deceased's condition, he said that she looked fresh and she could speak. DW3 also talked to the deceased a few words. The deceased replied him. She thanked DW3 for becoming the witness for her will. DW3 said that the deceased did not sign the will because her hand was shaking. So they did not agree that she should sign the will and they suggested it to her. Otherwise, the signature would be different. The deceased did not protest. She was very conscious at that time.

[52] On the other hand, Dr Lee (PW4) testified that based on the deceased's medical records (CBOD1 Part B pp 29 to 31) on 20 June 2011, the deceased's mental condition was normal. She was conscious and alert. On 20 June 2011 the deceased was capable of and should be able to sign a document. In fact, when the deceased was admitted on 20 June 2011, the hospital doctor did a physical examination on her ie the glasgow coma scale scoring for her. It consisted of three elements, namely her eye response, her verbal response and her motor response. The deceased had full scores or full marks, which, according to Dr Lee, the deceased was fully conscious and normal, like normal people. However, when the deceased was later admitted again to the hospital on 4 July 2011 till 11 July 2011, her physical condition deteriorated and she became weaker and weaker. She was under heavy sedation to make her pain free and comfortable. Dr Lee informed the court that if a person is under sedation the conscious level would be depressed or impaired. She might not be alert to her surroundings. The deceased passed away on 11 July 2011 in that same physical condition from fourth stage cancer.

[53] From the above evidence, the court finds that if indeed the 2011 will was truly executed (which the court does not think so), the deceased was certainly mentally alert and could chat with DW2 and DW3. She certainly would have the testamentary capacity to exercise her mind to make her will.

However, it is hard to believe that she was too weak to sign the will. She scored full marks for her glasgow coma scale scoring and would have full motor control as well. It is highly improbable that she could not sign the will. Moreover, according to DW2 and DW3, the deceased could greet them, chat with them and thanked them for coming. She 'looked ok' and she 'looked fresh'.

[54] The conclusion is that the deceased did not execute the will by affixing her thumbprint on it when she was fully conscious on 20 June 2011. Otherwise she would have signed it since her motor control was normal. There is a high probability that what the plaintiffs alleged is true ie that the deceased's thumbprint was affixed by the defendant when the deceased was heavily sedated and not fully conscious after 20 June 2011, in the days before she passed away.

[55] The court further notes that if indeed the defendant and DW2 and DW3 are to be believed (which the court does not) regarding the purported execution of the will on 20 June 2011 by the deceased, and if they claimed that the deceased was too weak to sign and therefore had to thumbprint the will, then the serious doubt that arises is who actually dated the will. It could not have been the deceased because, according to the defendant and DW2 and DW3, she was purportedly too weak to sign it. One of the two witnesses to the will dated the two signatures of the two witnesses. So, the logical conclusion is that the defendant was the one who dated the will. That is certainly not proper or acceptable since he was not a party to the will.

[56] The court further finds it unsatisfactory that the 2011 will, being drafted in English, was not read and translated to the deceased by a qualified translator. Even though DW1, the solicitor who prepared the will, said that she translated the will into Cantonese over the telephone to the deceased sometime in May 2011, the court notes that DW1 admitted that their telephone conversation was regarding the particulars of the properties of the deceased. DW1 said that she and the deceased did not talk about the defendant being the sole beneficiary. There is no evidence that DW1 read and translated all the contents of the will to the deceased, word by word and line by line, in her presence, or of any endorsement or record of such translation. DW1 confirmed that she did not attest the will for the deceased.

[57] In this respect, though the deceased was conscious and alert, it cannot be said that she had the full understanding or testamentary capacity to execute the will since it was drafted in English and it was not properly read and translated to her in full by DW1, or even by DW2 and DW3, or any qualified

translator. The defendant himself was not conversant in English. He testified in the Malay language in court. So he could not have translated the will to the deceased either.

[58] Even though the Cambodian maid (PW5) was not adamant about the exact date that she accompanied the deceased to hospital, and even though under cross-examination, she stated that the deceased went to hospital twice, once for leg pain and once for profuse bleeding, and even though ultimately she could have gone to the hospital to be with the deceased for more than once eg three or four times, the fact remains that her evidence is consistent when she maintained that at the time when the deceased was admitted to hospital on 20 June 2011 and was in the ward, she did not see anyone, other than the defendant and her own employer (PW3), who is the deceased's sister, coming to see the deceased. I have observed her demeanour and PW5 appears to be an honest witness, simple in her ways, and with no guile. It is therefore highly improbable that DW2 and DW3 came to the deceased's ward on 20 June 2011 between 1pm and 2pm to witness the thumbprinting of the will by the deceased.

[59] As admitted by DW1, the attestation clause in the 2011 will is not correct because it is stated therein that the deceased signed the will when in actual fact she did not do so.

[60] In considering suspicious circumstances in the preparation of a will, the following is an extract from the Court of Appeal decision, *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97; [2002] 4 CLJ 90 where at p 103(MLJ); 96 (CLJ) Gopal Sri Ram JCA (as he then was) referred to *Theobald on Wills* (15th Ed) at p 36 under the heading, 'suspicious circumstances':

> If a will was prepared and executed under circumstances which raise a well-grounded suspicion that the will (or some provision in it, such as the residuary gift) did not express the mind of the testator, the will (or that provision) is not admissible to probate unless that suspicion is removed by affirmative proof of the testator's knowledge and approval. A classic instance of suspicious circumstances is where the will was prepared by a person who takes a substantial benefit under it. Another instance is where a person was active in procuring the execution of the will under which he takes a substantial benefit by, for instance, suggesting the terms of the will to the testator and instructing a solicitor chosen by that person.

[61] The above describes aptly what actually transpired in the execution of the will in the present case.

[62] After weighing the evidence in totality, my conclusion is that the 2011 will was not executed by the deceased on 20 June 2011 between 1pm and 2pm at the hospital. The deceased had the testamentary capacity to execute the will

in that she was normal and strong enough to execute the will. However, the will in English was not translated in full to her. Thus, she did not have the full understanding or testamentary capacity regarding the contents of the will in toto. There was no necessity for her to thumbprint her will because she was physically able to do it. The circumstances surrounding the making of the will are far too suspicious for the court to believe the defendant and DW2 and DW3 that the deceased did execute the will as alleged by them, making the defendant the sole beneficiary of all the properties of the deceased to the total exclusion of the plaintiffs and the deceased's other siblings whom the deceased loved.

[63] The court finds that the defendant appears to have a propensity to disregard the requirements of the law that bind him. He chose not to register his purported marriage with the deceased, and he further 'married' a second time DW4 as his second wife during the continuance of his purported first marriage with the deceased. He also chose not to register his second marriage under the law, and fathered two children with DW4. It is therefore highly probable that he caused the 2011 will to be thumbprinted by the deceased when she was highly sedated, in the few days before she died, and later got the assistance of his two friends, DW2 and DW3, to sign as the witnesses to the will, without regard to the law on the making of a valid will.

The 1984 will

[64] Counsel for the defendant submitted that the plaintiffs, being the propounder of the 1984 will ('the will') did not discharge the burden of proving that the deceased had the testamentary capacity to execute the will and that there were no suspicious circumstances surrounding the execution of such will. Moreover, the two witnesses to the will were not called to testify in court on the matter.

[65] With respect, the court disagrees with the above submission. It is to be noted that the 1984 will (CBOD1 Part B pp 1–4) has been agreed by both parties during the case management stage, that this document is classified as a Part B document. This means that the authenticity, or the making of the will, was not disputed from the outset. Therefore, the maker of the will and the two witnesses to the execution of the will are not required to come to court to testify on the authenticity of the will. However, counsel for the defendant is at liberty to cross-examine the plaintiffs' witnesses on the contents of the 1984 will.

[66] The 1984 will was produced by P1. Neither P1, P2 or PW3, PW6, PW7 and PW8 were cross-examined on the contents of the will. In the absence of any challenge by the defendant on the contents of the will, the Court accepts

A the contents of the 1984 will as being unrebutted. Neither did the defendant produce any other witness, other than the defendant, to dispute the contents of the 1984 will.

B **[67]** From the evidence of the plaintiffs, PW3, PW6, PW7 and PW8, it is clear that the deceased, being the eldest sister of her younger siblings, had always loved, cared for and provided for them. The deceased gave the titles of the properties to P1 for safe-keeping (CBOD1 Part A pp 1–10). Way back in the early 1980s, the deceased told P1 that if she died her properties must be distributed among her siblings. To ensure this, she asked P1 to keep the titles C for her. Since then, P1 had been keeping the titles for the deceased. P1 also informed the court that the deceased told her that she was disappointed when the deceased married again and although she and the defendant remained together they had big fights. This evidence was not rebutted by the defendant.

D **[68]** In 1984, the deceased told P1 that she had written a will through a lawyer. She gave P1 an envelope and told P1 to keep it safely. P1 has kept it all these years, together with the property titles.

E **[69]** The deceased told P1 that she had bequeathed her various properties to plaintiffs and her other siblings. This is consistent with the contents of the 1984 will.

F **[70]** The deceased told P1 that she had nominated P1 and her brother Toh Cheong ('PW8') equally for her EPF. The confirmation of the EPF nomination is in CBOD1 Part A p 11.

[71] According to P1, the deceased kept reminding P1 in all the years that P1 has a duty to see that when the deceased died, P1 was to make sure that the G deceased's 1984 will is followed exactly, as it was her last wish.

[72] The deceased's two friends, Liw Kim Lan ('PW6') and Lim Chin Goon ('PW7') informed the court that they were both respectively told by the deceased after she became ill that she had bequeathed her properties to her H siblings. As submitted by counsel for the plaintiffs, these are independent witnesses, with no ulterior motive to lie.

[73] P2 confirmed that at no time did the deceased change her 1984 will. After the deceased's death, P1 produced the envelope that the deceased gave I her. The plaintiffs went to see a lawyer to seek advice. The envelope was opened and the 1984 will was inside.

[74] PW3 testified that after the deceased became ill, she moved in with PW3 into the Taman Kepong house. PW3 was looking after the deceased most of the time. PW3 did not think that the deceased would change her 1984 will without telling her siblings because the deceased was like a mother to her younger siblings. If she did, the deceased would have told PW3. A

[75] From the testimonies of the plaintiffs and the deceased's other siblings, in view of the natural love and affection that the deceased had for her siblings, it is nothing suspicious, and in fact it is only logical, that in 1984 the deceased would have made all her siblings as the beneficiaries of all her properties in her 1984 will. B C

[76] At this point, it is to be noted that when DW1 prepared the 2011 will for the deceased, the deceased told DW1 that she did not wish to sign it yet. The deceased said that she would only do so in the future when she was ready, and even then she would get her witnesses. This shows that the deceased had hesitation and a reluctance to execute the 2011 will. D

[77] From an overall evaluation of the evidence adduced, it is highly probable that the deceased finally did not sign the 2011 will, leaving therefore the 1984 will as her last will and last testament. E

DECISION

[78] Going by the above considerations, the plaintiffs' claim is allowed as follows: F

Prayers 17 (i) and (ii) of the plaintiffs' claim in the SOC are allowed.

Costs of RM10,000 are to be paid by the defendant to the plaintiffs jointly under prayer 17 (v), but no costs are to be awarded under prayer 17 (iv). G

There is no order for prayers 17 (iii) and (iv) of the SOC since they have been appropriately withdrawn by counsel for the plaintiffs for the reason that the claim for the granting of probate for another will, ie the 1984 will, cannot be made by this court since 0 71 of the ROC has yet to be invoked (see para 2 of plaintiffs' reply submissions). H

There is no order as to interest on the costs under prayer 17 (vi).

This claim is limited to only the citation given by the court dated 6 August 2012 in respect of the grant of probate extracted under the Kuala Lumpur High Court Petition No 32NCVC-09 of 2011 regarding the 2011 will which was deposited in court for the purpose of having it revoked. I

A *Plaintiff's claim allowed.*

Reported by Kanesh Sundrum

B

C

D

E

F

G

H

I